NEW YORK LAW SCHOOL

NYLS Law Review

Volume 40
Issue 1 *Volume XL, Numbers 1 & 2, 1995*

Article 17

January 1995

PRIVATE POLICE AND PERSONAL PRIVACY: WHO'S GUARDING THE GUARDS?

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I. INTRODUCTION

Popular perceptions are that the rate of crime in America has increased over the past several years.[1] As a result, crime has become a popular issue in contemporary politics.[2] As a further result, communities have enacted innovative programs in order to ensure the safety of their

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1. This perception is shown by the abundance of newspaper articles referring to the war on crime. *See, e.g.*, Mike Barnicle, *On the Streets, a Human Target*, THE BOSTON GLOBE, Aug. 15, 1993, at 29; James Bennet, *New York Crime Statistics vs. Reality*, N.Y. TIMES, Aug. 16, 1992, at L39; Marc Cooper, *Posse: Joe Arpaio's Boys Are White, Angry, and Armed. And They're The Law*, THE VILLAGE VOICE, Jan. 24, 1995, at 30 ("'[E]veryone says this is the year that crime is the big issue'" (quoting the Maricopa County, Arizona Sheriff)); Dick Feagler, *No Sympathy Here for Banned Station*, THE PLAIN DEALER, June 10, 1994, at 2A ("Crime is the No. 1 concern of our viewers," quoting a TV executive in Florida); Clifford Krauss, *New York's Violent Crime Rate Drops to Lows of Early 1970's*, N.Y. TIMES, Dec. 31, 1995, § 1, at 1 (noting the actual drop in crime rates "belying commonly held fears of wanton violence"); Sam Roberts, *If it's Tuesday, it Must be Time to Fight Crime*, N.Y. TIMES, Jan. 14, 1991, at B1; Charles E. Silberman, *Any War On Crime Has To Go Deeper Than Talking Tough*, NEWS TRIB., Feb. 6, 1994, at F6 ("Many Americans think crime is worse than ever."); Cal Thomas, *A Nation's Soul*, BALTIMORE SUN, Aug. 3, 1994, at 15A. *See also* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1992, Table 2.3 (1992) (respondents reporting problems in own neighborhood) (identifying crime as the worst neighborhood problem in 1990); U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994, Table 2.31 (1993) (54% of respondents believe that crime has increased in their own area). In fact, the perception is ungrounded. *See* Krauss, *supra* (noting the drop in crime rates to a new twenty-year low).

2. *See, e.g.*, Ted Gest, *Congress and Cops*, U.S. NEWS & WORLD REP., Dec. 26, 1994, at 31; David G. Savage & Ronald J. Ostrow, *GOP to Seek New, Stronger Anti-crime Bill*, L.A. TIMES, Nov. 12, 1994, at A29; Richard Wolf, *GOP Wants to Lock in Tougher Jail Sentences*, USA TODAY, Feb. 10, 1995, at 4A; Richard Wolf, *Republicans Bite into Crime Bill*, USA TODAY, Feb. 9, 1995, at 8A.

residents.[3] One method that both urban and suburban communities alike have employed is the use of private security officers and patrols.[4]

Private law enforcement officials[5] are not subject to the same rules controlling the behavior of the official police.[6] The procedural protections contained in the Constitution and the Bill of Rights limit only the actions of the government, and not the actions of private individuals.[7] The absence of a legal framework of procedural protection from private law enforcement officials is particularly distressing in view of their

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3. Gated communities are an example: *see, e.g.*, Gardner P. Dunnan, *Is Safety a Question of Class and Caste?*, N.Y. TIMES, Oct. 23, 1994, at C13; Eugene Weber, *Parking in Fortress Los Angeles Bares the Angelino Psyche*, N.Y. TIMES, Sept. 9, 1989, at L22. Curfews are another: *see, e.g.*, Richard Weizel, *Street Violence and Teen-Age Curfews*, N.Y. TIMES, June 19, 1994, § 14, at 1; and so are neighborhood watch programs: *see, e.g.*, Carol Chastang, *Not Your Average Joe; a Community Activist Takes His War on Crime and Blight to the Street*, L.A. TIMES, Sept. 25, 1994, at J12; Juliet Eilperin, *Hill Residents Fight War on Crime But Police Say the Battle Still Rages*, ROLL CALL, Nov. 17, 1994 at 32; Otis White, *The Best-run Town in Florida*, FLA. TREND, Feb. 1995, at 36.

4. *See, e.g.*, John Devine, *Class, Race, Security*, N.Y. TIMES, Dec. 31, 1995, § 13, at 11 ("The [private] security force [in schools] is going to get bigger and bigger. . . . [The force is now] 3000 plus and growing, which is slightly less than the entire police force in Boston."); Bruce Lambert, *A Fierce Debate Raging Over Plans for Security Force*, N.Y. TIMES, Aug. 28, 1994, § 13, at 5 (reporting plan by New York City community to employ a 500-person private security force to patrol its neighborhood); Bruce Lambert, *A District That Wasn't: No Private Police Force Here*, N.Y. TIMES, Dec. 31, 1995, § 13, at 6 (noting the death of the plan for over 500 private security guards on New York City's upper east side in part due to the lack of accountability the public would experience with the private officers); Clare Collins, *Hiring Private Security Guards to Cut Neighborhood Crime*, N.Y. TIMES, Aug. 8, 1994, at C6; Thomas J. Lueck, *Public Needs, Private Answers*, N.Y. TIMES, Nov. 20, 1994, at B1; Kathy Scruggs, *Private Cops Likely in Downtown Area*, ATLANTA J. & CONST., Feb. 4, 1995, at C-2; Susan Steinberg, *Westside Cover Story: Crime Takes a Fall*, L.A. TIMES, Feb. 21, 1995, at J10.

5. The terms "private law enforcement official," "private security officer," and "institutional private party" are used interchangeably throughout this Note and include any individual or organization involved with law enforcement or security, but lacking official police authority.

6. *See infra* notes 54-61 and accompanying text.

7. *See, e.g.*, Burdeau v. McDowell, 256 U.S. 465 (1921) (holding that the Fourth Amendment applies only to actions of the government). *See also* United States v. Goldberg, 330 F.2d 30 (3d Cir. 1964); People v. Tarantino, 290 P.2d 505 (Cal. 1955); People v. Fierro, 46 Cal. Rptr. 132 (1965).

growing role in the nation's law enforcement and security industry.[8] Searches which could not otherwise be performed by the police can be performed by private law enforcement officials: any evidence seized pursuant to such a search is admissible in court.[9] The situation violates the spirit of the Fourth Amendment, which guarantees that citizens shall be free from unreasonable invasions of their right to privacy.[10] Allowing courts to use evidence seized in this manner amounts to a constructive[11] violation of a person's Fourth Amendment rights. Therefore, the same exclusionary practices should apply to all searches no matter the character of the searcher: as one court has said, "[t]he result in each case is the same—invasion of the [individual's privacy]."[12]

However, broadening the scope of the exclusionary rule based strictly on a more generous interpretation of the Fourth Amendment is difficult to imagine. The rule that the Fourth Amendment applies only to state action is well-settled. Nonetheless, the problem continues and personal privacy is threatened. At least one court has explicitly recognized this and applied constitutional limitations to private searchers.[13] However, that court was overruled five years later.[14] That overruling is consistent with the vast

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8. *See* John M. Burkoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627, 646 n.95 (1981) (discussing the vast and rapidly growing role of private security and law enforcement in our society). *See also* GEORGE O'TOOLE, THE PRIVATE SECTOR: PRIVATE SPIES, RENT-A-COPS, AND THE POLICE-INDUSTRIAL COMPLEX at xi-xv (1978).

9. *See, e.g.*, United States v. Thomas, 613 F.2d 787 (10th Cir. 1980) (allowing evidence seized by United Parcel Service); United States v. Reed, 810 F. Supp. 1078 (Alaska 1992) (allowing evidence seized in a private search with peripheral involvement by police); United States v. Pollack, 414 F. Supp. 203 (D.C. 1976) (allowing evidence seized in private search); People v. Crank, 590 N.Y.S.2d 149 (1992) (direction by or cooperation with the police necessary to make search attributable to the state); Cullom v. State, 673 P.2d 904 (Alaska 1983) (holding that search by store security guard was not state action). *But see* People v. Zelinski, 594 P.2d 1000 (Cal. 1979) (applying constitutional limitations to store security guard where the guard asserted the power of the state to arrest and detain a shoplifter).

10. *See* U.S. CONST. amend. IV. *See also* SALTZBURG & CAPRA, AMERICAN CRIMINAL PROCEDURE (4th ed. 1992) ("[T]he Amendment plainly recognizes a right. . . . The cases [can] suggest that the Amendment protects privacy. To some extent this must be true."). *Id.* at 26.

11. "That which has not the character assigned to it in its own essential nature, but acquires such character [as a] consequence in the way in which it is [construed]." BLACK'S LAW DICTIONARY 164 (5th ed. abr. 1983).

12. State v. Hyem, 630 P.2d 202, 206 (Mont. 1981), *overruled by* State v. Long, 700 P.2d 153 (Mont. 1985).

13. *Hyem*, 630 P.2d at 202.

14. *Long*, 700 P.2d at 153.

bulk of Fourth Amendment jurisprudence. Therefore, short of a major shift in judicial interpretation of the Constitution, the best way to protect privacy is to amend the rules of criminal procedure to bar the use in court of evidence seized unlawfully,[15] regardless of the character of the searcher. As this Note will illustrate, support for doing so can be found in various areas of the law.

As background, Part II of this Note examines the pervasive role of private law enforcement in modern society.[16] Next, Part III traces the history of the Fourth Amendment, identifies the principles behind it, and demonstrates how those principles are held inviolate by use of the exclusionary rule.[17] Part IV then discusses four arguments that support extending the scope of the exclusionary rule to unlawful searches by private parties: the history and spirit of the Fourth Amendment; analogy to precedent; the imperative of judicial integrity; and the public function doctrine.[18] Finally, Part V ties the arguments together, and suggests that the best possible means to prevent these private searches and provide a remedy when they do occur is by extending current exclusionary practices.[19]

II. THE ROLE OF PRIVATE LAW ENFORCEMENT AND SECURITY

The increase in institutional private law enforcement is arguably a result of a growing perception that municipal police forces are less able than in the past to deal with the growing rate of crime.[20] In 1992, 30% of the national population believed that the police were only coping

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15. As used throughout this note, this term and "illegally" mean without proper consent.

16. *See infra* notes 20-28 and accompanying text.

17. *See infra* notes 29-84 and accompanying text. The extensive treatment of the Fourth Amendment is central to understanding its pivotal role throughout history and supporting the argument for extending exclusionary principles. *Cf.* Everson v. Board of Educ., 330 U.S. 1, 8 (1946) (explaining the appropriateness of an in-depth review of the history of the Establishment Clause of the First Amendment for the Court to render its decision).

18. *See infra* notes 85-173 and accompanying text. These sections present the clear need for extending the exclusionary rule to unlawful searches by private institutional searchers. Although comparison with *individual* private searches is occasionally used for the sake of clarity, individual private searches are not the focus of this Note.

19. *See infra* notes 174-92 and accompanying text.

20. *See* O'TOOLE, *supra* note 8; LEO F. HANNON, THE LEGAL SIDE OF PRIVATE SECURITY, at xi-xii (1992).

"fairly" with crime.[21] Crime consistently ranked high among the most important problems facing the country. A result of this is a feeling of helplessness, and consequently the role of private law enforcement in our society has been expanding steadily.[22]

The presence of private law enforcement is now vast.[23] The private security industry affects every aspect of society.[24] Private security is present in urban and suburban law enforcement, sometimes outnumbering police personnel.[25] Its pervasive role is a vital part of the creation and maintenance of a safe environment in which to work and live.[26] And the effects of private security growth are visible: for example, in neighborhoods and communities across the country, there are signs alerting intruders of the presence of private security forces that patrol the area.[27] The private law enforcement industry is formidable and continues to grow at a rate of 10-15% per year.[28] It is the relationship between this industry and the citizens it protects that this Note examines in particular.

III. THE FOURTH AMENDMENT AND THE EXCLUSIONARY RULE

A. *The Fourth Amendment*

The Fourth Amendment ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

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21. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1992, Table 2.14 (1992) (respondents' ratings of local police solving crime); U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994, Table 2.11 (1995) (30% of respondents' reported "some" confidence in the police while 10% reported having "very little").

22. *See* O'TOOLE, *supra* note 8, at xi-xv. *See also* Douglas Frantz, *A Midlife Crisis at Kroll Associates*, N.Y. TIMES, Sept. 1, 1994, at D1, 5 (reporting on success of a leading private investigative firm in the private security industry).

23. Burkoff, *supra* note 8, at 646 n.95.

24. *Id.*

25. For example, in 1986, General Motors employed 4200 private security officers, a force larger than all but five municipal police forces in America at that time. *See* O'TOOLE, *supra* note 8, at xii; *see also* Devine, *supra* note 4 (noting New York City's private security force for schools is nearly the size of Boston's regular police department).

26. *See id.*

27. *See supra* note 3.

28. O'TOOLE, *supra* note 8, at xii.

and seizures . . . ."[29] Its history is important to the analysis that follows.

In the years preceding the American Revolution, writs of assistance, which authorized arbitrary searches and seizures and required no description of the nature of the search or the property sought therefrom, were commonly issued.[30] Typically, these writs authorized searches of cellars, warehouses, ships, and persons for the purpose of finding illegal goods (contraband), or goods for which no customs or duties had been paid.[31] Writs of assistance issued from local courts within the Colonies, and all attempts to invalidate them were consistently rejected as contrary to the Act of William III.[32] In February 1761, James Otis, Jr., a leading voice of revolutionary debate, argued at a hearing that was to determine the validity of writs granted by state courts.[33] He attacked not only the validity of the writs themselves, but also the entire policy of England towards the Colonies.[34] This was one of the first notable movements towards revolution.[35] In the words of John Adams, "then and there the brat Independence was born."[36] Challenges to the writs persisted, and the cry to ensure the individual right of privacy sprang to the forefront of pre-revolutionary debate and dissension.[37]

In the post-revolutionary days during the drafting of the Constitution, concern over writs of assistance and the larger issue of individual privacy

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29. U.S. CONST. amend. IV.

30. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51-78 (1937) (detailing the history of writs of assistance in the Colonies). A writ of assistance was traditionally issued by a court of equity in aid of the execution of a judgment at law, which transfers the possession of lands to a particular complainant including, as the case may be, the state. *See* BLACK'S LAW DICTIONARY 1784 (4th ed. 1968).

31. Boyd v. United States, 116 U.S. 616, 623 (1886) (discussing the purposes of writs of assistance).

32. Nevertheless, the writs apparently *were* illegal under a strict interpretation of the Act of William III. The Act specifically authorized the writs to issue from the Court of Exchequer in England. However, no such entity existed in the Colonies to properly issue the writs, and the Court of Exchequer's power did not extend that far. *See* LASSON, *supra* note 30, at 61-62.

33. LASSON, *supra* note 30, at 57, 58. *See id.* at 56-63 for an extensive treatment of the Writs of Assistance Case.

34. *Id.* at 58.

35. *Boyd*, 116 U.S. at 625.

36. *Id. See also* LASSON, *supra* note 30, at 59.

37. *See* LASSON, *supra* note 30, at 58-60.

did not fade.[38] Protection from government invasion of privacy was consistently debated during the Constitutional Convention.[39] A division developed between those who wanted a bill of rights that would protect certain enumerated fundamental rights (including the right to privacy) and those who felt that a bill of rights was unnecessary.[40] Advocates of a bill of rights noted that in the past decade most states had drafted and adopted a bill of rights for their constitutions. Such advocates felt that itemization of certain inviolable individual rights and liberties was absolutely crucial and particularly appropriate in organizing a new central government.[41] Those opposed to a bill of rights were not against the notion of securing individual rights and liberties *per se*, but withheld their approval for more fundamental reasons.[42] First, they feared the implications of *espressio unius est exclusio alterius*.[43] They did not want to risk having an itemized list of protected individual rights and then be foreclosed from adding to that list in the future.[44] Second, and more fundamental, objectors felt that the inclusion of a bill of rights was simply unnecessary under the theory of delegated and reserved powers upon which the Constitution was to be based.[45] Individual rights were to be secured by the people's relationship with their state governments since either the state governments or the people were left with all powers and authority not specifically divested to the new federal government.[46] Where state bills

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38. *See* 1 THE COMPLETE ANTI-FEDERALIST 64-70 (Herbert J. Storing ed., 1981) (outlining the push by colonists for an amendment to insure against future invasions of privacy).

39. *See id.*

40. *Id.* at 65. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913) (describing at length divisions between Federalists and Anti-Federalists during the Convention).

41. Storing, *supra* note 38, at 2:6-8 (citing a letter from Elbridge Gerry, delegate to the Constitutional Convention, listing among his objections to the draft of the Constitution "that the system is without the security of a bill of rights").

42. LASSON, *supra* note 30, at 79-105.

43. Literally, "the expression of one is the exclusion of another." Under this maxim of statutory construction, the expression of certain rights will exclude the existence of others. BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

44. LASSON, *supra* note 30, at 90.

45. *Id.* at 91; 1 Storing, *supra* note 38, at 65. *See* THE FEDERALIST NO. 84 (Alexander Hamilton) (presenting structural arguments against a Federal bill of rights).

46. LASSON, *supra* note 30, at 99 (quoting James Madison). *See also* U.S. CONST. amend. IX.

of rights already existed to protect individual rights,[47] opponents of a Federal bill of rights felt that such an addition to the Constitution would be "superfluous and absurd."[48]

The debate at the Constitutional Convention ended with a political compromise among the participants to adopt a bill of rights after ratification of the Constitution.[49] While concern over protection of individual rights and liberties did not stop ratification of the Constitution, it is significant to this Note that the individual right to privacy in one's home was central in the debate over a bill of rights.[50] This debate demonstrated a backlash against the days of arbitrary invasions of privacy under the dubious authority of general writs of assistance.[51] Since then, the guarantee of a right to privacy under the Fourth Amendment has become one of the great pillars of individual liberty,[52] at tension with the power of the government to provide for the safety and welfare of the people.[53]

The Fourth Amendment "was adopted in view of long misuse of power in . . . searches and seizures both in England and the colonies; and the assurance against any revival of it . . . ."[54] Its principles embody the belief that arbitrary and capricious governmental power is to be guarded against by expressly ensuring that specific fundamental rights may not be infringed upon in the absence of certain procedural protections.[55]

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47. *See* LASSON, *supra* note 30, at 80-82 (citing examples of early declarations of rights by the States).

48. Storing, *supra* note 38, at 65-66 (quoting James Wilson's state-house speech delivered October 4, 1787).

49. LASSON, *supra* note 30, at 94-95. *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981) (detailing the formation of the bill of rights).

50. Indeed, it was of such concern that it prevented two states (North Carolina and Rhode Island) from ratifying the Constitution in a timely manner. LASSON, *supra* note 30, at 104. *See* STORING, *supra* note 49, at 3.

51. *See* Byars v. United States, 273 U.S. 28, 33 (1927).

52. *See generally* Boyd v. United States, 116 U.S. 616, 626-30 (1886) (tracing through history the importance of the individual right to privacy secured by the Fourth Amendment).

53. U.S. CONST. art. I, § 8.

54. *Byars*, 273 U.S. at 33.

55. The idea was well put by William Pitt:

> The poorest man may, in his cottage, bid defiance to all of the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

LASSON, *supra* note 30, at 49-50 (citations omitted).

B. *The Exclusionary Rule*

1. Development

Although the history of the adoption of the Fourth Amendment points to a clear restriction on government authority, the Amendment itself fails to address directly the use of any evidence seized in violation of its principle.[56] In fact, the issue was never even addressed by the United States Supreme Court until nearly 100 years after the Bill of Rights was adopted.[57] In the first case, *Boyd v. United States*,[58] the Court answered in the affirmative the question of whether relevant but illegally seized evidence must be excluded from use in court.[59] Unable to see any significant distinction between seizing a person's property to be used as evidence against him and compelling that person to be a witness against himself, the Court concluded that evidence illegally seized by the government is inadmissible in actions against its owner.[60] Thus, based on a combination of Fourth and Fifth Amendment principles, the exclusionary rule was created.[61]

Initially, the exclusionary rule applied only to unlawful searches by federal agents in federal proceedings[62] but left untouched situations where state agents supplied illegally seized evidence in federal proceedings and where state agents supplied illegally seized evidence in state proceedings.[63] Its scope was extended to cover unlawful searches by state agents in federal proceedings in *Elkins v. United States*,[64] which ended the "silver platter" doctrine. Finally, in *Mapp v. Ohio*,[65] the Court, which relied on the Fourteenth Amendment, applied the rule to searches by state agents in state proceedings.[66] This effectively closed

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56. *See infra* notes 62-67 and accompanying text.

57. *See* Boyd v. United States, 116 U.S. 616 (1886).

58. *Id.*

59. *Id.* at 636-37.

60. *Id.* at 630-31.

61. *Id.*

62. *See* Weeks v. United States, 232 U.S. 383, 391-93 (1914).

63. This was called the 'silver platter' doctrine. The phrase was taken from Lustig v. United States, 338 U.S. 74, 79 (1949). It meant that law enforcement authorities could satisfy their goals by using evidence unlawfully seized by another group of authorities. Those authorities were said to have given the evidence to the federal authorities on a 'silver platter' for use in their judicial proceeding.

64. Elkins v. United States, 364 U.S. 206 (1960).

65. Mapp v. Ohio, 367 U.S. 643 (1961).

66. *Id.* at 670-71.

the remaining loophole in Fourth Amendment protection that was of significant concern at the time.[67]

2. Policy and Principle

By ensuring that the Federal and state governments will not benefit from evidence seized in violation of an individual's right to privacy, the exclusionary rule removes the incentive to conduct illegal searches.[68] If law enforcement agents know that illegally seized evidence cannot be used to convict a defendant, they will be less likely to invade a citizen's privacy.[69] The exclusionary rule seeks to strike a balance between preserving the individual's interest in privacy and facilitating the government's interest in detecting and punishing crime.[70] Nowhere is this balance seen more clearly than with the "good-faith" exception to the exclusionary rule. In *United States v. Leon*,[71] the Supreme Court modified the exclusionary rule to allow use of evidence seized by government agents in reasonable reliance on a validly issued warrant.[72] The Court found that, in this specific type of situation, excluding the evidence in question did not serve any of the policy goals of the Fourth Amendment.[73]

Dissenting in *Burdeau v. McDowell*, Justices Brandeis and Holmes reminded us that the government is subject to the laws of this nation as is any citizen and that "[a]t the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that

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67. The role of private law enforcement at the time of *Mapp* was not as extensive as it is now. *See* O'TOOLE, *supra* note 8. *See generally* Paul G. Reiter, Annotation, *Admissibility, in Criminal Cases, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553 (1971) (discussing the origins, development and application of the exclusionary rule).

68. John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030 (1974). *See also* Connell L. Archey, *The Status of Private Searches Under the Louisiana Constitution of 1974*, 49 LA. L. REV. 873, 890-901 (1989) (discussing in detail the policy behind the exclusionary rule in the context of private searches).

69. *See infra* notes 128-31 and accompanying text. *See also* Archey, *supra* note 68, at 893-96.

70. *See* Kaplan, *supra* note 68, at 1030.

71. 468 U.S. 897 (1984).

72. *Id.* at 908-13.

73. *Id.* at 916-17. The policy goals the Court recognized were deterring future police misconduct, punishing current non-compliance with the law, and deterring judicial misconduct.

are commands to the citizen."[74] This principle lays the foundation for the notion that government should not benefit (i.e., secure criminal convictions) from unlawful activities (i.e., illegal private searches).[75]

3. Application

The exclusionary rule's effectiveness depends on fulfilling two requirements.[76] First, the agents performing the search must be motivated by securing convictions.[77] This interest will force them to search lawfully so that they may use any seized evidence in court.[78] Second, the particular agents performing the search must engage in searches regularly.[79] This regularity ensures that they will have knowledge of the exclusionary rule and, therefore, abide by its restrictive framework.[80] Satisfying these two requirements ought at least to minimize the frequency of, and at best avoid, unlawful searches and seizures.

However, because the exclusionary rule applies only to state action,[81] its goal of protecting individual privacy is not being met.[82] A rapidly growing private law enforcement industry is becoming more and more involved in ensuring public safety. It has lead to a variant silver platter situation where the evidence is handed over for prosecutorial purposes.[83] To close this loophole, the scope of the exclusionary rule ought to be broadened to bar the use in court of evidence seized unlawfully by any party—public or private.[84]

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74. Burdeau v. McDowell, 256 U.S. 465, 476-77 (1921) (Brandeis, J. and Holmes, J., dissenting).

75. *See infra* note 133.

76. Harvey L. Ziff, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608, 614-15 (1967).

77. *Id.*

78. *Id.* at 615.

79. *Id.*

80. *Id.*

81. *See supra* note 7 and accompanying text.

82. *See generally* O'TOOLE, *supra* note 8 (discussing in detail the extent to which individual privacy is invaded by the vast private law enforcement industry).

83. *See supra* note 60 and accompanying text.

84. *See infra* notes 87-192 and accompanying text.

IV. EXTENDING THE PRINCIPLE OF EXCLUSION

There is an inherent conflict between the policy goals of the exclusionary rule and other governmental goals in the context of private searches. In direct tension with the government's interest in the traditional goals of law enforcement (i.e., reducing crime and apprehending criminals) is the government and the people's interest in preserving an individual's privacy.[85] While a perfect balance between the two is difficult to achieve, the interest in securing privacy is arguably more compelling than the interest in providing law enforcement agents with another potentially overbearing enforcement tactic.[86] The arguments that follow: spirit of the Fourth Amendment, analogy to precedent, judicial integrity, and the public function doctrine, taken together show the need and the support for extending the scope of the exclusionary rule to bar admission in court of evidence seized unlawfully by private law enforcement officers.

A. *History and Spirit of the Fourth Amendment*

Examining the spirit and history of the text of the Fourth Amendment yields support for extending the scope of the exclusionary rule to unlawful private searches. This analysis of the Fourth Amendment takes us past the formalistic bar to excluding fruits of illegal private searches simply because they are not the result of state action.[87]

The Fourth Amendment creates a right to privacy for all citizens and safeguards them from unreasonable searches and seizures by the government.[88] While the Framers of the Amendment were concerned specifically with searches and seizures performed directly by the government, the Amendment could legitimately be regarded more broadly

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85. *See* Archey, *supra* note 68, at 893.

86. Fundamental rights and liberties frequently dominate in importance over police powers and other interests of the government. *See infra* notes 150-57 and accompanying text.

87. *See infra* notes 108-25 and accompanying text; *see also infra* notes 147-52.

88. United States v. Ford, 553 F.2d 146, 153 & n.29 (D.C. Cir. 1977) (holding that the Fourth Amendment protects a right of privacy which is the core protection from overbearing government officials); Hall v. Garson 430 F.2d 430, 438 (5th Cir. 1970) (identifying the right to privacy as one of the most personal of rights). *But see* Burdeau v. McDowell, 256 U.S. 465 (1921) (holding that Fourth Amendment does not protect citizens from actions by other citizens even if the seized items are eventually turned over to the government); *see also* Boyd v. United States, 116 U.S. 616 (1886); Archey, *supra* note 68, at 893-94 (discussing the right to privacy conferred by the Fourth Amendment); SALTZBURG & CAPRA, *supra* note 10.

as having created a general realm of privacy to which each citizen is entitled.[89] In other words, the Fourth Amendment could be viewed in a positive manner—as an affirmative grant of privacy rights to individuals—[90] rather than solely as a limiting doctrine on governmental powers.[91]

While traditionally the Amendment has been interpreted as a limiting doctrine, by virtue of those very limitations it has made a *de facto* grant of privacy rights.[92] The courts have left a certain portion of the realm of individual privacy inviolable except under very limited circumstances.[93] This sacred area is the realm of individual privacy: arguably citizens have an interest in preserving it from invasion, expecially whereby they are held criminally liable.[94] It is a common understanding that when the government breaches this realm of privacy by using unlawfully seized evidence in court, there is an invasion of individual rights and, thus, a violation of the letter and spirit of the Fourth Amendment.[95] By analogy, even when a private searcher breaches the walls of privacy the harm is no less severe and privacy is diminished nonetheless.

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89. M.E. BRADFORD, ORIGINAL INTENTIONS (1993), at xii (explaining the teleocratic approach to constitutional interpretation). Under this approach, the Constitution was conceived, written and adopted to create a particular type of society based upon principles of individual liberty, justice, and equality.

90. *See id.*

91. *Id.* at xi. Bradford also explains the nomocratic view of the Constitution. Under this approach, the Constitution is a limiting doctrine meant only to bring the newly created government within the bounds of the law, and no more.

92. Archey, *supra* note 68, at 894 ("[A]lthough the fourth amendment may be concerned only with governmental intrusions, it clearly serves the purpose of securing an inviolable 'zone of privacy' for the individual."). *See also* BRADFORD, *supra* note 89, at xii.

93. *See* Archey, *supra* note 68, at 894; BRADFORD, *supra* note 89, at xii. The face of the Amendment supports this: it recognizes the government's power to search and seize property but that very power is constrained by the requirement of reasonableness and probable cause. *See* U.S. CONST. amend. IV. Thus, an *un*reasonable search *necessarily* invades the right to privacy as does a search conducted pursuant to a warrant issued without probable cause, barring certain explicit exceptions such as good faith reliance on an invalid warrant. *See, e.g.*, U.S. v. Leon, 468 U.S. 897 (1984) (establishing the good faith exception to the exclusionary rule).

94. *See* Archey, *supra* note 68, at 894; BRADFORD, *supra* note 89, at xii.

95. *See infra* notes 126-73 and accompanying text.

The history of the text of the Fourth Amendment also supports the concept of a realm of privacy.[96] Notably, the Amendment is not in the form originally approved by the House of Representatives.[97] The text of the Amendment originally read, in relevant part: "[t]he right of the people to be secured [sic] in their persons . . . shall not be violated by warrants issuing without probable cause . . . ."[98] This text, approved by the House, served only to limit the issuance of warrants to cases where probable cause existed[99] and established no broader right to privacy. The text was revised by Egbert Benson, Chairman of the Committee of Three, appointed to arrange the formal, ordered amendments which would comprise the Bill of Rights.[100] Despite the fact that the House never actually approved of his changes, the revision created the amendment as it has stood for over two hundred years.[101] That text reads (in reverse order for emphasis), "no warrant shall issue, but upon probable cause supported by Oath or affirmation . . ." and that "[t]he *right* of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated . . . ."[102] Not only does it limit the issuance of warrants, but arguably, it creates a broader right as well.[103] Parsing the text like this shows more clearly the establishment of a general right to privacy which is the underpinning of the Fourth Amendment.

Where a private search contains the substance and essence of a government search and effects its substantial purpose,[104] the safeguards of the Fourth Amendment should bar the use in court of the fruits of an unlawful private search. Indeed, it is likely that, given current conditions, the Framers would agree to extend the rule.[105] Arguments emphasizing

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96. Interpreting the Fourth Amendment in a teleocratic rather than nomocratic manner was popular at one time too. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 630 (1886) ("[I]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .").

97. LASSON, *supra* note 30, at 101-02.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* In fact, the House of Representatives even voted against Benson's changes when he originally submitted them during the Constitutional Convention. *Id.*

102. U.S. CONST. amend. IV (emphasis added).

103. *See* BRADFORD, *supra* note 89, 114.

104. *Boyd*, 116 U.S. at 635.

105. "The struggle against arbitrary power in which [the Framers] had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had

form over substance ought not to prevail where fundamental rights are concerned.[106] The privacy principle of the Fourth Amendment, illustrated by its history and its text, supports extending exclusionary practices to bar the use in court of evidence seized unlawfully by private law enforcement agents.

B. *Analogy to Precedent*

Support for extending the reach of the exclusionary rule is found in, and by drawing an analogy to, a principle identified and discussed in several Supreme Court cases.[107]

Circumvention of privacy safeguards was condemned by the Supreme Court in *Elkins v. United States*[108] and *Rea v. United States*.[109] *Elkins* ended "silver platter" situations where evidence from illegal state searches was admitted in federal proceedings, even if that evidence was seized in violation of the Fourth Amendment.[110] The Court attacked the incongruity in exclusionary practices that admitted evidence unlawfully seized by state officials that would be barred were it obtained through similar unlawful practices by federal officials.[111] While it is arguable that the incongruity was more obvious in *Elkins*, where state action was involved, than in private search cases, the Court in *Elkins* established some broad principles which are nevertheless relevant to the private search issue.[112]

Justice Stewart began his analysis of exclusionary practices by taking a historical perspective.[113] He returned to the principles set out nearly fifty years ago in *Weeks v. United States*,[114] and noted that "the effect of the [Fourth] Amendment is to put the courts of the United States . . . in the exercise of their power and authority, under limitations and restraints . . . . [Unlawful law enforcement practices] should find no

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so deeply abhorred." *Id.* at 635.

106. *See* People v. Defore, 242 N.Y. 13 (1926) (Cardozo, C.J.) ("We exalt form over substance when we hold that the use is made lawful becuase the intruder is without a badge of office.").

107. *See, e.g.*, Elkins v. United States, 364 U.S. 206 (1960); Rea v. United States, 350 U.S. 214 (1955). *See also* People v. Defore, 242 N.Y. 13 (1926) (Cardozo, C.J.).

108. 364 U.S. 206.

109. 350 U.S. 214.

110. *Elkins*, 364 U.S. at 223-24.

111. *Id.* at 215.

112. *See id.* at 215-17.

113. *Id.* at 208.

114. 232 U.S. 383 (1914).

sanction in the judgments of the courts . . . ."[115] He emphasized that "[t]o the victim [of an unlawful search] it matters not whether his constitutional right has been invaded by a federal agent or by a state officer."[116] This analysis easily applies to private search scenarios. To the searched party, the result of a court using unlawfully seized evidence against him is the same regardless of the character of the party who seized the evidence: federal, state, or private.[117] The evidence seized in each situation is used to convict a person of criminal activity. The individual's privacy is invaded in one of the worst ways possible: the individual is subjected to criminal liability or other adverse actions.[118]

Rea v. United States[119] dealt with a situation similar to that in *Elkins*. The Court held that evidence unlawfully seized by a federal agent was inadmissible in a state court proceeding.[120] The Court concluded that the policy of protecting the privacy of a particular citizen would be defeated if the fruits of an unlawful search by a government agent are used in a judicial proceeding against that citizen.[121]

This broad principle is equally applicable to the private search scenario and, if applied, could block the end-runs around the Fourth Amendment that private police are getting away with. The exclusionary rule rests on the notion that if the fruits of an unlawful search of a citizen are used against that person, the promises of (i) privacy guaranteed by the Fourth Amendment, and (ii) to be free from self-incrimination as guaranteed by the Fifth Amendment, are empty.[122] We see this by focusing on the effect of the search, which makes it clear that privacy rights are violated when a court uses unlawfully seized evidence against an individual.[123]

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115. *Elkins*, 364 U.S. at 209 (quoting Weeks v. United States, 232 U.S. at 391-92).

116. *Id.* at 215.

117. *See id.*

118. *Id.*

119. 350 U.S. 214 (1955).

120. *Id.* at 217-18.

121. *Id.* at 218.

122. *Cf.* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1919) (Holmes, J.) (stating that where the government wants to use evidence admittedly seized unlawfully "reduces the Fourth Amendment to a form of words." (citation omitted)); *see* Boyd v. United States, 116 U.S. 616, 630-31 (1886).

123. Note that in both *Elkins*, 364 U.S. at 223-24, and *Rea*, 350 U.S. at 218, the Court focused on the character of the party performing the search. *See also* People v. Defore, 242 N.Y. 13 (1926) (Cardozo, C.J.) (noting that the nature of the privacy invasion should be emphasized, not the character of the searcher).

The similarity between the harms in the state-action scenario and the private search scenario supports an extension of the principle of *Weeks*, *Elkins*, and *Rea*.[124] The harm inflicted on the person is equal regardless of the character of the searcher. Although the Supreme Court has steadfastly held that the Fourth Amendment applies only to actions of the government,[125] nevertheless rooted in this precedent is a principle which lends strong support to extending the scope of the exclusionary rule to unlawful private searches.

C. *The Argument for Judicial Integrity*

The policy of maintaining judicial integrity favors extending the scope of the exclusionary rule to unlawful private searches.[126] This policy distances courts from individual conduct that would taint the integrity of the courts.[127] Current exclusionary practices do in effect maintain some judicial integrity in that they do not allow courts to be a party to illegal activities of official law enforcement authorities conducting unlawful searches.[128] Otherwise, the integrity of the courts would be jeopardized when they used evidence adversely against a person which was seized in contravention of the law. Likewise, the use of evidence unlawfully seized by private parties makes the court, in a sense, a party to the harm caused by the invasion of privacy that has occurred. The imperative of judicial integrity and the risk of derogating it, demands correcting this situation and strongly supports extending the exclusionary rule to unlawful private searches.

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124. *See* People v. Eastway, 241 N.W.2d 249, 250 (Mich. 1976) (asserting that there is "ample authority for the proposition that the exclusionary rule does and should apply to evidence discovered as the result of an unreasonable search and seizure conducted by private security guards.").

125. United States v. Goldberg, 330 F.2d 30 (3d Cir. 1964) (reaffirming that the holding in *Burdeau* limiting application of the Fourth Amendment to state agents was unimpaired by the holdings in both *Elkins* and *Rea*), *cert. denied*, 377 U.S. 953 (1964).

126. Archey, *supra* note 68, at 896-97.

127. *Id.*

128. The exclusionary rule works to heed the admonition of Justice Brandeis:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Judicial integrity requires creating a balance between the courts' rights-protecting function and their fact-finding function.[129] By allowing use of evidence seized illegally by a private party, courts enhance their fact-finding capabilities but also infringe on a right that they are supposed to protect. In effect, they sanction invasions of privacy by creating the incentive of obtaining criminal prosecution.[130] As a result, their rights-protecting function is degraded because they are participating in violating individual privacy. Although the courts' role as a fact-finding institution is critical to the effective implementation of law enforcement policy,[131] preserving individual rights ought to weigh more heavily than simply making available to the courts another avenue of obtaining competent evidence concerning a case.[132]

For the imperative of judicial integrity to be most forceful and effective, one must consider the violation of privacy to be more than a one-time occurrence where the harm is inflicted only at the time of the actual physical invasion, i.e. the search.[133] In fact, the damage from the invasion continues and becomes worse when the courts use the unlawfully seized evidence at trial against the invaded party.[134] Viewing a violation of privacy in this manner dispenses with the formalistic criticism that the courts are not an actual and direct party to the violation of privacy.[135] Thus, whether or not the government is present at the actual time of the unlawful search is not a necessary factor in considering judicial integrity. The fact that they utilize the fruits of the unlawful search compounds the harm inflicted on the victim of the search.[136] As Justice Black stated, under differing circumstances, "[in] our constitutional system, courts stand against any winds that blow as havens of refuge for those who might

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129. Archey, *supra* note 68, at 896-97.

130. *See generally id.* (discussing the exclusionary rule and the reasons for its development); Burkoff, *supra* note 8 (same); Reiter, *supra* note 67 (same).

131. *See generally* Archey, *supra* note 68; Reiter, *supra* note 67.

132. *See supra* note 86; *infra* notes 147-52 and accompanying text.

133. *Cf.* U.S. v. Leon, 468 U.S. 897, 935 (1984) (Brennan, J., dissenting) (asserting that interpreting the Fourth Amendment as to apply only to the actual search procedure is a "crabbed reading").

134. *See id.* at 934-35.

135. *See id.* at 937-38.

136. *Cf. id.* (asserting that when a government agent violates individual privacy by unlawfully seizing evidence, the courts participate in the violation by using the evidence against that individual in a criminal proceeding).

otherwise suffer . . . ."[137] They are *not* supposed to be a governmental institution that oppresses individual rights. This promise can be fulfilled only by preserving the integrity of the courts which, in turn, can be done by extending the scope of the exclusionary rule to private searches.

Variations in the theme of judicial integrity have surfaced in Supreme Court cases that reinforce extending the scope of the exclusionary rule.[138] In the landmark case of *Shelley v. Kraemer*,[139] the Supreme Court held that enforcement of a racially restrictive covenant in a deed to real property by a state court constituted sufficient state action to violate the Equal Protection clause of the Fourteenth Amendment.[140] Although the holding in *Shelley* was reached through a state-action analysis, the conclusion was based ultimately on the related doctrine of judicial integrity.[141] If the lower court enforced the restrictive covenant, it would have become a party to the discrimination—an intolerable result that would have sacrificed that court's integrity.[142] By analogy, courts' use of evidence seized in an unlawful search by a private law enforcement officer creates sufficient government participation to detract from the integrity of the courts and to warrant application of the exclusionary rule.[143]

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137. Chambers v. Florida, 309 U.S. 227, 241 (1940) (Black, J.) (holding that use of coerced confessions violates the due process guarantees of the Fourteenth Amendment).

138. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, Douglas & Marshall, J.J., dissenting) (uppermost in the minds of the Framers were "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people . . . that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."); Terry v. Ohio, 392 U.S. 1, 13 (1968) (stating "[c]ourts . . . will not be made party to lawless invasions of the constitutional rights of citizens . . . ."); Lombard v. Louisiana, 373 U.S. 267, 278-280 (1963) (Douglas, J., concurring) (elaborating on the holding in Shelley v. Kraemer, 334 U.S. 1 (1948)); *see also* United States v. Mount, 757 F.2d 1315 (D.C. Cir. 1985) (Bork, C.J., concurring) (identifying the purposes of the exclusionary rule as deterrence and judicial integrity); United States v. Main, 598 F.2d 1086 (7th Cir. 1979) (discussing the role of judicial integrity in exclusionary practices); Honeycutt v. Aetna Insurance Co., 510 F.2d 340 (7th Cir. 1975) (discussing the role of judicial integrity in the exclusionary rule). *But see* United States v. Turk, 526 F.2d 654 (5th Cir. 1976) (criticizing the imperative of judicial integrity as being a goal of exclusionary rule given only lip-service in the past).

139. 334 U.S. 1 (1948).

140. *Id.* at 20-23.

141. *Id.* at 18-19.

142. *Id.*; *see also Leon*, 468 U.S. at 897 (Brennan, J., dissenting).

143. *See* Ziff, *supra* note 76, at 614-15. *See also Leon*, 468 U.S. at 937-38 (Brennan, J. dissenting).

There are many parallels in the facts and principles between *Shelley* and those at issue in the typical search by a private law enforcement officer. As in *Shelley*, where the state participation came in the form of the court enforcing the restrictive covenant, the participation of the state in the private search situation consists of the court's use of the illegally seized evidence against the defendant.[144] Furthermore, just as the restrictive covenant in *Shelley* was not itself violative of the Fourteenth Amendment, a private search is not itself violative of the Fourth Amendment.[145] In both instances, the violation occurs when the courts enter the picture and enforce adverse judgments against individuals.[146]

Furthermore, it is well-settled that certain actions of the judiciary can be considered state action.[147] Indeed, there are many instances where judicial action has been barred because it is state action and held violative of the law.[148] For example, the courts cannot impose a racial qualification on prospective jurors.[149] Nor can they impose penalties or deprive citizens of their rights without notice and an opportunity to be heard.[150] Coerced confessions, in violation of the Fifth Amendment, are barred from use by the courts,[151] as is the use of testimony received without assistance of counsel.[152] By natural extension of this doctrine, the use in court of evidence illegally seized by private parties amounts to state action that invades individuals' right to privacy and freedom from unreasonable searches and seizures.

While the causal relationship in a private search situation is distinguishable from the one in a search performed by a government

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144. *See Shelley*, 334 U.S. at 13.

145. *See id.* (setting aside possible arguments that private action could violate the Fourth Amendment).

146. *See id.*

147. *Id.* at 14 ("[t]hat the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State . . . is a proposition which has long been established by decision of this Court.").

148. *See id.* at 15-18 (providing numerous examples of judicial state action).

149. Strauder v. West Virginia, 100 U.S. 303 (1880).

150. Brinkerhoff - Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930).

151. Chambers v. Florida, 309 U.S. 227 (1940).

152. De Meerleer v. Michigan, 329 U.S. 663 (1947); Tomkins v. Missouri, 323 U.S. 485 (1945); Williams v. Kaiser, 323 U.S. 471 (1945); Powell v. Alabama, 287 U.S. 45 (1932).

agent,[153] this distinction is not fatal. In *Shelley*, the constitutional violation would not have occurred *but for* enforcement of the restrictive covenant by the court.[154] In a private search situation, the privacy violation has already begun by the time the state becomes involved through the use of the evidence in court.[155] This distinction does not detract entirely from the legitimacy of the analogy. Concededly, the causal relationship between the court and the "wrong" committed is stronger in *Shelley* than in the private search situation, where the nexus is more attenuated. While the initial search may be done by a private party, its nature is significantly worsened when a court uses the illegally seized evidence against its owner.[156] Viewed this way, a court participates in committing the "wrong." Thus, the variations between causal relationships in *Shelley* and the private search situations are slight.[157]

While there seems to be a division over what the primary policy goal behind the exclusionary rule is,[158] each policy nonetheless supports exclusion of evidence illegally seized by private parties. Although the degree of benefits depends on the nature of the search itself,[159] the policies of both deterrence of future illegal searches and judicial integrity

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153. Ziff, *supra* note 76, at 614.

154. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

155. *See* United States v. Janis, 428 U.S. 433, 458 & n.35 (1976) (asserting *a fortiori* that any privacy violation resulting from a search is complete by the time the evidence gets to court).

156. Indeed, not only is the individual's right to privacy breached, but the victim of the search is subject to criminal liability.

157. *But see* Ziff, *supra* note 76, at 614 (arguing the causal relationship is too attenuated for a constitutional claim in a private search scenario).

158. *See, e.g.*, Illinois v. Gates, 462 U.S. 213 (1983) (White, J., concurring); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414 U.S. 338 (1974).

159. *Gates*, 462 U.S. at 259 & n.14 (1983) (White, J., concurring). There are two types of private searches: those performed by individuals and those performed by institutions. We see the benefits of broadening the scope of the exclusionary rule to searches performed by private institutions by way of comparison with searches performed by private individuals. Extending the scope of the rule will not deal effectively with private individual searches. An individual is unlikely to be aware of the exclusionary rule and would not likely be deterred from unlawful conduct in the future. On the other hand, the institutionalized private searcher is far more likely to be aware of the rule and will want to comply with it to achieve its goal of apprehending criminals and securing convictions. Because institutional private security poses the greatest threat to individual privacy, at least some of the ends of the exclusionary rule would be met if its scope were extended to cover unlawful private searches. *See* Archey, *supra* note 68, at 898-901; Ziff, *supra* note 76, at 614-15.

are fulfilled by extending the exclusionary rule to private searches.[160] Thus, arguments for judicial integrity support broader exclusionary practices. The integrity of our courts is too important to be jeopardized by a private police force acting outside the law.

D. *The Public Function Doctrine*

When a private entity or individual assumes and performs functions that have been traditonally and exclusively reserved to the government, that entity or individual becomes subject to constitutional limitations in its relations with the public.[161] While a somewhat high standard has been set by some courts for private activity to be attributed to the state under the public function doctrine,[162] it is clear that the doctrine has been interpreted and applied differently in varying cases.[163] Nonetheless, at the foundation of the doctrine lies the principle that "[a] state cannot avoid its obligations under the due process clause by delegating to private persons the authority to deprive people of their property without due process of law."[164]

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160. *But see* Ziff, *supra* note 76, at 614 (arguing that extending the exclusionary rule would not promote the ends of the Fourth Amendment).

161. Marsh v. Alabama, 326 U.S. 501 (1946) (holding that a private "company" town which assumed a wide variety of public functions became subject to constitutional limitations under the public function doctrine); White v. Scrivner, Corp., 594 F.2d 140, 142 (5th Cir. 1979) (holding that state action is present by the exercise by a private entity of powers which are traditionally exclusively reserved to the state). *See* Ziff, *supra* note 76, at 617; Burkoff, *supra* note 8, at 644-58.

162. *White*, 594 F.2d at 142.

163. *Compare* Showengerdt v. General Dynamics, Corp., 823 F.2d 1328 (9th Cir. 1987) (holding private security agents performing a search at a Naval installation were state actors); Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423 (10th Cir. 1984) (holding that a store security guard allowed "to substitute his judgment for that of the police" was state actor), *cert. denied*, 474 U.S. 818 (1985); Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983) (holding private person administering polygraph test on behalf of police was state actor); Goichman v. Reuben Motors, Inc., 682 F.2d 1320 (9th Cir. 1982) (holding private towing company working for the police was state actor) *with* Morast v. Lance, 807 F.2d 926 (11th Cir. 1987) (holding a national bank, although regulated by federal authorities, was not a state actor when firing an employee); United States v. Lima, 424 A.2d 113 (D.C. App. 1980) (store detective with law enforcement goals similar to regular police not state actor); State v. Buswell, 460 N.W.2d 614 (Minn. 1990) (race track security agent not state actor); State v. Sanders, 448 A.2d 481 (N.J. 1982) (even where state required detailed casino security, guards were not state actors).

164. Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc., 795 F.2d 1344, 1346 (7th Cir. 1986).

The institutional private search[165] scenario is particularly ripe for application of the public function doctrine.[166] Where private entities such as private security companies are explicitly granted governmental functions or powers, the entities "become agencies or instrumentalities of the State and subject to its constitutional limitations."[167] Surrender by a state of its investigatory and detention powers arguably amounts to a delegation of traditional sovereign power, and thus, subjects the delegatee to constitutional limitations.[168]

Private law enforcement organizations are the groups most likely to invade individual privacy rights because of the organizations' prevalence in the law enforcement field,[169] the organizations' special psychological and tactical advantages over citizens,[170] and the organizations' lack of formal training of their officers.[171] Thus, application of the public function doctrine to regulate their behavior would help safeguard individual privacy. However, making a determination as to whether an entity has assumed a public function necessarily involves a close and careful examination of the individual facts of each situation.[172] Leaving the analysis to be performed on such an *ad hoc* basis could lead to inconsistent and incongruous results.[173] Therefore, a blanket extension of the exclusionary rule to private parties would best protect the interests of personal privacy.

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165. *See supra* note 162.

166. Ziff, *supra* note 76, at 615 ("[I]nstitutionalized private searchers have a strong enough interest in acquiring criminal convictions to be expected to change their investigatory methods if the exclusionary rule were applied to them.").

167. Evans v. Newton, 382 U.S. 296, 299 (1966).

168. National Labor Relations Board v. Jones & Laughlin Steel Corp., 331 U.S. 416, 429 (1947) ("[I]t is a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs or peace officers to protect the private property of their private employers. And when they are performing their police functions, they are acting as public officers and assume all the powers and liabilities attached thereto.") *See also* Burkoff, *supra* note 8, at 644-58 (discussing the public function doctrine).

169. *See supra* notes 20-28 and accompanying text. *See also* O'TOOLE, *supra* note 8.

170. Burkoff, *supra* note 8, at 644-58 (discussing the difference between official powers and those of an ordinary citizen, and the breadth of apparent authority that private law enforcement officials have in relation to private citizens).

171. O'TOOLE, *supra* note 8, at 3-19.

172. *See* Burkoff, *supra* note 8, at 645.

173. *See supra* note 166.

V. CONCLUSIONS AND RECOMMENDATIONS

There are social benefits and costs that also must be taken into account before categorically extending the scope of the exclusionary rule to unlawful private searches.[174] The costs and benefits relate back to the rule's purposes. The benefits of extending the scope of the rule are preserving the individual interest in privacy by deterring future misconduct and maintaining judicial integrity.[175] The cost of extending the rule is to interfere with the government's interest in detecting and punishing crime.[176]

Where the entities performing private searches are motivated by securing convictions in addition to looking after their own private interests,[177] exclusion of evidence illegally seized by them will likely deter them from performing unlawful searches in the future.[178] This deterrence would benefit the interests of individual privacy, and the cost is minimal.[179] Even conceding that there might be a minor initial decrease in the effectiveness of law enforcement overall, this cost can be ameliorated if agents performing searches simply would adhere to the rules against unlawful searches.[180]

The same analysis also supports applying exclusionary practices to searches by private individuals. Some may argue that the benefit of extending the exclusionary rule to private individuals is weak in comparison to the cost because barring the use of evidence unlawfully seized by a private individual is not likely to make any difference in that individual's behavior in the future.[181] The argument continues that individuals are not usually aware of evidentiary rules and practices; they will not be deterred from performing such illegal searches;[182] therefore, the benefits are minimal. Furthermore, private individuals regularly provide valuable and useful information to law enforcement officials, and if this evidence were to be barred from the courts under a blanket

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174. *See* Archey, *supra* note 68, at 894-97.

175. *See id.*

176. *Id.* at 898.

177. Ziff, *supra* note 76, at 615. *But see* United States v. Garlock, 19 F.3d 441, 443 (8th Cir. 1994) (explaining that many private security organizations pursue ends completely unrelated to obtaining criminal convictions).

178. *See* Ziff, *supra* note 76, at 615.

179. *See* Archey, *supra* note 68, at 898.

180. *Id. See also* Ziff, *supra* note 76, at 615.

181. Archey, *supra* note 68, at 898.

182. *See supra* note 68 and accompanying text.

exclusion, the demands of law enforcement would be seriously impaired.[183] Thus, the argument concludes, the costs to effective law enforcement are high.

However, this argument disregards the importance of privacy. A reinvigorated view of the right to privacy consistent with its position in our constitutional history diminishes the effectiveness of the cost/benefit argument in connection with searches by private individuals. Deterrence and judicial integrity aside, to the individual against whom the evidence is being used, *who* searched him and seized the evidence is less important than the fact that it is being used against him.

Remedy in tort is often hailed as a better method to deal with the problem of illegal searches than extending exclusionary practices.[184] Some prefer it over present exclusionary practices because it compensates the victim of the privacy invasion, rather than acting solely to deter future misconduct by the searching party, the dominant goal of current exclusionary practices.[185] However, tort alone cannot fully protect privacy rights because the issue at hand is not only compensation for the victim.[186] Exclusionary practices also implement the policy that the state may not benefit from illegal activity and protect the courts from becoming tainted by such illegal activities.[187] Extending exclusionary practices to private searches will serve all these interests and, perhaps in combination with a remedy in tort, would best serve the policies of the Fourth Amendment. Extending the rule is an appropriate reinforcement to the civil, criminal, and administrative remedies that may also exist in many jurisdictions.[188] For example, in the case of an unlawful private search, application of the exclusionary rule would fully vindicate the privacy rights of the victim by denying the use of the evidence in court. The private searcher could then be sued in tort for trespass, charged with criminal trespass or breaking and entering, and sanctioned (if appropriate) by a regulatory agency of the state. However, the best remedy for the injured party remains to have the evidence excluded from a court

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183. Archey, *supra* note 68, at 898-99. *See generally* United States v. Russell, 411 U.S. 423, 432 (1973) (discussing the difficulties of obtaining evidence in certain cases and acceptable remedies for this problem).

184. Archey, *supra* note 68, at 901.

185. United States v. Ross, 655 F.2d 1159, 1208 (D.C. Cir. 1981) (Tamm, C.J., dissenting).

186. *See* Mapp v. Ohio, 367 U.S. 643, 670 (1961) (Douglas, J., concurring) ("[t]respass actions against officers who make unlawful searches and seizures are mainly illusory remedies.").

187. *See supra* notes 126-73 and accompanying text.

188. *See* Archey, *supra* note 68, at 901.

proceeding against him or her to prevent the deprivation of the right of privacy.

Fear that the extension of exclusionary practices would "result in the proscription of nonrecurrent conduct which does not present the type of danger at which the fourth amendment was aimed," is unfounded.[189] The fears that led to the Fourth Amendment were of organized institutions, acting under what appeared to be the authority of the state arbitrarily invading a citizen's right to personal privacy. This is just what will occur as the private security industry continues its remarkable growth.

In the end, four arguments support extending the scope of the exclusionary rule to bar the use in court of evidence seized unlawfully by private institutional parties in court. The history and spirit of the Fourth Amendment provide the necessary principles.[190] Precedent provides a legal foundation.[191] The doctrine of judicial integrity and the public function doctrine provide legal justifications.[192] With these reasons for extending the exclusionary rule, the interests of justice will be better served and the interests at hand effectively balanced. In the end, individual privacy will be better secured in our modern society where such security is becoming more and more difficult to ensure.

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189. Ziff, *supra* note 76, at 614.

190. *See supra* notes 87-106 and accompanying text.

191. *See supra* notes 107-25 and accompanying text.

192. *See supra* notes 126-73 and accompanying text.